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Supreme Court, U.S.
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No. 94-42

In The

Supreme Court of the United States

October Term, 1994

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA, FLATHEAD AGENCY, Ernest Moran, in their capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, and Henry Normandeau,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR TRIBAL RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Petitioner's refusal to exhaust available Tribal remedies, as required under *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), coupled with the resultant lack of any judicial record on the merits of the underlying challenge to Tribal jurisdiction, render certiorari unwarranted?

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OPINIONS BELOW

The Opinion of the District Court, reported at 824 F.Supp. 940 (D.Mont. 1993), is reprinted in Petitioner's Appendix to its Petition for Certiorari at A-1 through A-15. This Court has previously denied certiorari under Supreme Court Rule 11, at ___ U.S. ___, 113 S.Ct. 2950 (1993), found at page A-16 of Petitioner's Appendix. The final decision of the Ninth Circuit Court of Appeals summarily affirming the dismissal for failure by Petitioners to exhaust Tribal remedies is reported at 19 F.3d 1318 (9th Cir. 1994), page A-17 of Petitioner's Appendix (hereafter "Pet. App.").

JURISDICTION

Jurisdiction over this final decision of the Circuit Court lies at 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

Petitioners incorrectly identify the jurisdiction of this Court at 28 U.S.C. § 2101(e) (Petition p. 2), which applies to "review a case before judgment has been rendered in the court of appeals."

Tribal Respondents were served with the Petition on July 7, 1994.

CONSTITUTION, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case exclusively involves the following Tribal ordinances and regulations, reprinted in the Tribes' Appendix:

1) The Aquatic Lands Conservation Ordinance, Ordinance 87A (verbatim)

2) The Aquatic Lands Conservation Ordinance Regulations (relevant portions)

STATEMENT OF THE CASE

This case highlights Petitioner's repeated efforts to avoid the requirement of exhaustion of Tribal remedies established in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) (hereafter *"National Farmers"*), and ratified in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) (hereafter *"Iowa Mutual"*). There, this Court ruled that any person challenging an assertion of Tribal jurisdiction over "reservation affairs" must first exhaust Tribal remedies prior to attempting federal court review. *Iowa Mutual* at 16. In this case, all lands, all acts of Tribal government, all Tribal Respondents and all Petitioners occur, are located or reside on the Flathead Indian Reservation. Accordingly, as the trial court determined, this is a "reservation affair." *Middlemist v. Secretary of the United States Department of Interior, et al.*, 824 F.Supp. 940, 944 (D.Mont. 1993), *cert. denied* ___ U.S. ___, 113 S.Ct. 2950 (1993), *aff'd* 19 F.3d 1318 (9th Cir. 1994) (hereafter *"Middlemist"*), (Pet. App. A-7).

In a well-reasoned decision adhering strictly to the Tribal exhaustion rule, the district court properly dismissed this case because Petitioners failed to exhaust Tribal administrative and judicial remedies provided for in the Aquatic Lands Conservation Ordinance ("ALCO"), a "civil regulatory ordinance designed to effectuate the

Tribal and federal goals of protecting the quality of Reservation aquatic habitat" *Middlemist* at 942 (Pet. App. A-2).[1]

In an extraordinary move, Petitioner sought immediate Supreme Court review of the district court decision, which was denied. ___ U.S. ___, 113 S.Ct. 2950 (1993). They then appealed to the Ninth Circuit, raising arguments identical to those in this Petition. The Circuit Court unanimously upheld the District Court dismissal in a one-sentence decision. In their unending efforts to avoid working with the Tribes, Petitioners request this Court to ignore *National Farmers* and *Iowa Mutual* and to conduct a trial de novo on unverified "facts" and selectively edited bits and pieces of a treaty, various Acts of Congress, and state laws which, having never been addressed by the Court below, are improperly included in the Petition and Appendix.

ALCO, the challenged ordinance, was approved by the Secretary of Interior in accordance with the Tribes' Indian Reorganization Act-based Constitution (25 U.S.C. § 461 et seq.). Implementing regulations were promulgated in 1986 after completion of a public review, comment and hearing process required under the federally-approved Tribal Administrative Procedures Ordinance. Even at this stage Petitioners did not avail themselves of

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[1] The Shoreline Protection Board, comprised of Tribal members and non-Indians, is the Tribal agency charged with administering ALCO. *See* Tribes' Appendix at A-5. Administrative remedies contained in ALCO and the regulations are set out in Tribes' Appendix A-10 and A-13 through A-18 respectively. Of note, Petitioners omitted these critical provisions of Tribal law from their Appendix.

the opportunities to participate in the actions of Tribal government. *See Middlemist* at 942 (Pet. App. A-2 through A-3). Petitioners never made application for a permit, never paid a fee, and were not denied a permit under ALCO. *Middlemist* at 943 (Pet. App. A-4).

Petitioners filed their challenge to Tribal jurisdiction in the federal court in the first instance, completely ignoring the available Tribal forums. The Tribes moved to dismiss based on Petitioner's failure to exhaust Tribal administrative and judicial remedies, as well as on questions of ripeness, standing, capacity to sue and sovereign immunity. *Middlemist* at 942. (Pet. App. A-2). Petitioners also sued the United States, which similarly moved to dismiss for, *inter alia*, failure to exhaust Tribal remedies. *Middlemist* at 942. (Pet. App. A-2).

Dismissal was granted solely on the basis of Petitioner's failure to exhaust Tribal remedies. *Id.* at 947. (Pet. App. A-4). Since the case never went to trial, there is no federal judicial record on the merits of Petitioner's challenge to Tribal civil jurisdiction over this reservation affair. Because Petitioners chose to ignore the Tribal forums, no Tribal record exists either.[2]

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[2] Supreme Court Rules 14(k)(i) and 14(k)(ii) require Petitioners to submit findings of fact and conclusions of law from the lower court. Instead, Petitioners unload a collection of 'facts' and law wholly outside of any record. For example, even though no court has determined that any lands are "open" or "closed" within the intensely fact-bound context of *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), they assert that several select tracts are "indisputably in the 'open' area of the Reservation." Petition at 20. That is both highly speculative and subject to dispute.

To the extent that any judicial record exists, it lies in the *Middlemist* opinion which addresses only Petitioner's failure to exhaust Tribal remedies contained in ALCO and its regulations. The decision is absolutely silent on the Constitutional, treaty and statutory construction and interpretation issues that Petitioners attempt to submit to this Court for de novo review.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND RELEVANT DECISIONS OF THIS COURT.

The Court below addressed the single question of whether a complaint filed in federal District Court challenging an assertion of Tribal civil jurisdiction over non-Indians within the exterior boundaries of an Indian reservation was properly dismissed for failure to first raise and exhaust that challenge in the Tribal forums whose jurisdiction is being challenged.

That important federal question has been answered in the affirmative by this Court in *National Farmers* and

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Similarly, despite assertions that ALCO is "patently unconstitutional and violative of the limits of tribal jurisdiction established in the Acts of Congress and this Court's decisons" (Petition p. 11), there is no administrative or judicial record to support that claim.

Petitioner's Appendix contains equally improper inclusions of (highly selectively edited) material in the form of bits and pieces of the Hellgate Treaty and various Acts of Congress not of record nor relied upon by the lower court.

Iowa Mutual, which control this case. The Court in *National Farmers* found that

> the existence and extent of a tribal court's jurisdiction will require a *careful examination* of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a *detailed study* of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself.

Id. at 855-856 (footnote omitted, emphasis added).

This Court concluded that "exhaustion is required before such a claim may be entertained by a federal court" because

> Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief.

Id. at 857 (citation omitted).

The District Court identified the three narrow exceptions to the exhaustion requirement found in *National Farmers* at 856, note 21, and properly determined that Petitioners failed to qualify for any of them. *Middlemist* at 946 (Pet. App. A-12). Having failed, Petitioners seek to fabricate new exceptions. First, they argue that since they filed under the Declaratory Judgment Act (28 U.S.C.

§ 2201), exhaustion would frustrate that Congressional Act. Petition at 17. However, in *Iowa Mutual*, this Court found that

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction."

Id. at 16.[3]

Petitioners also seek to avoid *National Farmers* and *Iowa Mutual* on the premise that those cases involved ongoing Tribal proceedings. They argue that since there were no Tribal proceedings here, exhaustion should not apply. The federal policies enumerated in *National Farmers* would not be served by such a crabbed application of the requirement.[4] Petitioners would have this Court create an exception that would destroy the rule; an

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[3] This Court has previously discredited identical arguments regarding federal question jurisdiction (*National Farmers* at 857) and diversity jurisdiction (*Iowa Mutual* at 17). In contradistinction, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *National Farmers* at 854.

[4] The three imperatives driving the exhaustion requirement are the federal policies of (1) "supporting tribal self-government and self-determination," (2) the fact that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed," and (3) to "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction" should further review be warranted. *National Farmers* at 856-857.

exception that sanctions a race-to-the-courthouse mentality and which, at the option of a claimant, can in every instance be used to defeat the rule.[5]

In a slight variation on this theme, Petitioners argue that exhaustion should not apply because it improperly elevates Tribal jurisdictional claims. Petition at 16-17. They argue that the state-law interests supporting abstention in *Younger v. Harris*, 401 U.S. 37 (1971), obviate the federal policies driving exhaustion. *Younger* defines one of the several judicial accommodations developed between the federal and state courts and does not address the judicial relationship between federal and tribal courts described in *National Farmers*. In a dispositive admission against interest, Petitioners concede that the policy driving *Younger* abstention simply "does not apply to tribes." Petition p. 17.

The District Court decision, summarily affirmed by the Ninth Circuit, adheres strictly to the *National Farmers* and *Iowa Mutual*. There is no conflict between the lower court and the decisions of this Court requiring exhaustion of Tribal remedies.

2. PETITIONERS RELY UPON INAPPLICABLE SUPREME COURT DECISIONS IN THEIR EFFORT TO LITIGATE THIS CASE DE NOVO.

Petitioner's litigation strategy denied the Federal and Tribal forums of the opportunity to develop findings of

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[5] The Circuit Courts have refused to accept identical arguments. *See Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405 (9th Cir. 1991), *cert. denied* 112 S.Ct. 1174 (1992) (hereafter "*Crawford*"); *see also, Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991).

fact and conclusions of law. As this Court said in *National Farmers*, challenges to Tribal jurisdiction require a "careful examination" and "detailed study" of the multitude of considerations inherent in an analysis of Tribal jurisdiction, including, *inter alia*, federal treaties, acts of Congress, and Executive policies, as well as issues of Tribal sovereignty, laws and regulations. *Id.* at 855-856. Yet, ironically, the Petition consists of legal arguments based entirely upon a foundation of treaty, laws, Executive policy, Tribal sovereignty and Tribal law and regulation that no court has even looked at in this matter.

From that fallacious foundation, Petitioners seek to precipitate a decision on the merits of their challenge to Tribal jurisdiction. They rely upon the decisions in *Montana v. United States*, 450 U.S. 544 (1981) (*"Montana"*), *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (*"Brendale"*) and *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993) (*"Bourland"*).[6] Those cases are substantively and procedurally inapposite. Exhaustion was not at issue. Each one was heard by this Court only after the trial court developed a record and that record was reviewed by a Court of Appeals.[7] Petitioners are effectively seeking to

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[6] Petitioners also rely upon the criminal law cases of *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) and *Duro v. Reina*, 495 U.S. 676 (1990) to avoid exhaustion in this civil case. This Court has previously refused to do so, finding that if done, "any exhaustion requirement would be completely foreclosed because federal court would *always* be the only forum" for cases such as this. *National Farmers* at 854 (emphasis in original).

[7] For example, the *Bourland* Court noted that the district court engaged in, and the Court of Appeals did not disturb, a

lure this Court into conducting a trial de novo on a highly selective, yet skeletal, submission of materials in their Appendix and Petition that have not been subjected to authentication, examination, rebuttal or augmentation by any party, much less to judicial analysis.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), decided with the benefit of at least a partial trial court record, this Court refused to entertain questions of the constitutionality of a rent control ordinance. Absent a fully developed trial record, this Court found consideration of the merits of such a challenge to conflict impermissibly with "our admonition that 'the constitutionality of statutes ought not be decided except on an actual factual setting that makes a decision necessary.' " *Id.* at 10, citation omitted. The same reasoning applies here.

Simply put, this case is premature. It is not ripe for resolution by this Court. There is no actual factual record. Therefore, the district court was correct when, as Petitioners put it, the court "flatly refused" to address their unsupported assertions of constitutional injury. Petition at p. 13, note 13. While Petitioners may in the future

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factual determination that specific Reservation lands were either "open" or "closed" within the *Brendale* context. *Bourland* at 2316, note 9. Here the only judicially determined fact on the character of the Reservation lands at issue is that they are "fee" lands "within the exterior boundaries of the Reservation." *Middlemist* at 942 (Pet. App. A-3). The *Bourland* Court also noted that the district court made "extensive findings" that none of the Tribal jurisdictional parameters addressed in *Montana* existed to support the Cheyenne River Sioux Tribe's position. *Bourland* at 2320.

present a properly developed record for review by this Court, there is presently no record for review.

3. THE CIRCUIT COURTS OF APPEALS UNIFORMLY AGREE WITH THE EXHAUSTION REQUIREMENT OF *NATIONAL FARMERS* AND *IOWA MUTUAL*.

The Ninth Circuit's summary affirmance of the district court decision is in complete harmony with its prior rulings and those of the other circuits. The case of *Burlington Northern Railroad v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991) ("*BN v. Crow*"), a Montana case which preceded the *Middlemist* decision, is indistinguishable. There, as here, non-Indians challenged in federal court Tribal civil regulatory jurisdiction within the exterior boundaries of an Indian Reservation under the Declaratory Judgment Act. (28 U.S.C. § 2201). There, as here, plaintiffs willfully avoided available Tribal forums and sought relief in the first instance in federal court. And there, as here, the Ninth Circuit upheld the rulings in *National Farmers* and *Iowa Mutual* and required exhaustion of Tribal remedies over reservation affairs. It's little wonder that the District Court here found *BN v. Crow* to be "controlling in this case." *Middlemist* at 944. (Pet. App. A-9).

The *Middlemist* Court, relying upon the fact that this is a "reservation affair" (as that term is used by the *Iowa Mutual* Court at p. 16), followed a long line of Ninth Circuit decisions requiring exhaustion of Tribal remedies prior to attempting federal court review. *See, Crawford supra; FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir.), *cert. denied* ___ U.S. ___, 111 S.Ct. 1404 (1991); *Stock West v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (en banc);

United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992), and most recently, an unreported opinion in another exhaustion case arising on the Flathead Indian Reservation, *Hinshaw v. Mahler*, No. 93-35199, (9th Cir. June 17, 1994).

The Eighth Circuit decision in *Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation*, No. 93-3622, 1994 U.S. App. LEXIS 13564 (8th Cir. June 8, 1994) is analogous. There, petitioners raised a similar challenge to Tribal civil regulatory jurisdiction over non-Indians on "fee" Reservation lands. *Id.* at **12-**13. There, as here, petitioners attempted to raise arguments on the merits under the aegis of *Montana*, *Bourland* and *Brendale*. *Id.* at **12-**16. There, as here, petitioners failed to raise their challenge in the available Tribal forums and instead first sought relief in federal district court. The *Duncan* Court, just as the *Middlemist* Court, properly refused to address the merits and dismissed for failure to exhaust Tribal remedies. *Id.* at **16-**20.

The other Circuits are uniform in their adherence to the requirement of Tribal exhaustion for reservation affairs. The Court in *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied* 114 S.Ct. 621 (1993), clearly ratified the rule for reservation affairs. *Id.* at 812-814. However, based upon the judicial record, the Court determined that because the off-reservation contract dispute at issue did not qualify as a reservation affair and because the Tribe expressly consented to suit in state and federal court under the contract, exhaustion was not mandatory in that instance. *Id.* at 814-815.

The Tenth Circuit decision of *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991) strongly upholds Tribal exhaustion, finding, *inter alia*, that "[t]he fact that some of the

parties . . . are non-Indians is immaterial", *Id.* at 444, and quoting *National Farmers, supra*, for the rule that "Regardless of the basis for jurisdiction", if a federal complaint addresses a reservation affair and Tribal remedies were not exhausted, dismissal is required. *Id.* at 444.

Because the Circuit Courts uniformly adhere to Tribal exhaustion requirements over reservation affairs, certiorari is not warranted.

CONCLUSION

The *Middlemist* Court's strict adherence to the procedural requirements of exhaustion set forth in *National Farmers* and *Iowa Mutual*, coupled with complete uniformity in the Circuit Courts, confirms that this is a garden variety Tribal exhaustion case. It raises no special or important reasons for invoking the jurisdiction of this Court. It clearly sanctions no departure by a lower court from the accepted and usual course of judicial proceedings.

Certiorari should be denied.

Respectfully submitted this 3rd day of August, 1994.

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APPENDIX 1

Ordinance No. 87-A

AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

PART I

SHORT TITLE, AUTHORITY

Section 1. Short Title.

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

PART II

FINDINGS AND POLICY

Section 1. Findings.

The Tribal Council finds that:

a. The self-governing capabilities, political integrity, health and welfare, and economic security of the Tribes will be protected and enhanced by Tribal governmental control, regulation and protection of aquatic lands which are critical for the perpetuation of Reservation fisheries

and wildlife, the preservation of Reservation water quality, and the maintenance of the health, safety and welfare of Tribal members and thereby of all persons residing on the Reservation.

b. The Treaty of Hellgate July 16, 1855 (12 Stat. 975) reserved to the Confederated Salish and Kootenai Tribes (hereinafter the "Tribes") the exclusive right to hunt and take fish within the exterior boundaries of the Flathead Reservation. The exclusive Treaty right to hunt and fish within the Reservation confers upon the Tribes the right, duty and responsibility to protect those Tribal interests.

c. Reservation population growth and increased unregulated utilization of aquatic lands are causing adverse impacts upon the quality of Reservation waters, fisheries and wildlife habitat, and therefore, there exists an immediate need to regulate and manage the use of aquatic lands to preserve and protect them.

Section 2. Policy.

It is the policy of the Tribal Council to prevent the degradation of Reservation waters and aquatic lands by regulating construction or installation of projects upon aquatic lands whenever such project may cause erosion, sedimentation, or other distrubances [sic] adversely affecting the quality of Reservation waters and aquatic lands.

PART III

GENERAL PROVISIONS

Section 1. Definitions.

For the purposes of this Ordinance the following definitions will apply:

a. "Adjacent" means bordering, contiguous or neighboring. Wetlands separated from other Reservation waters by man-made dikes or barriers, natural river berms and the like are "adjacent wetlands."

b. "Administrator" means the chief executive officer of the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

c. "Aquatic Lands" means, all land below the mean annual high water mark of a Reservation water body.

d. "Board" means the Shoreline Protection Board of the Confederated Salish and Kootenai Tribes.

e. "Discharge of dredged material" means any addition or placement of dredged materials into Reservation waters or on aquatic lands whether through direct placement, or by secondary means such as run-off, slumping or overflow from a disposal site.

f. "Discharge of fill material" means any addition or placement of fill materials into Reservation waters or onto aquatic lands.

g. "Dredged material" means material that is excavated, displaced, or removed from aquatic lands.

h. "Fill material" means any material used for the purpose of replacing Reservation waters with dry land or dredged material.

i. "Mean Annual High Water Mark" means that line on the shore of Reservation waters established by the fluctuations of water and indicated by physical characteristics such as a clear, naturally occurring line impressed on the bank; shelving changes in the character of soil; paucity or lack of terrestrial vegetation; or the presence of water borne litter or debris.

j. "Office" means the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

k. "Person" means any individual, partnership, association, corporation, and any other entity composed of individuals, and governmental entities.

l. "Project" means a physical alteration of aquatic lands, wetlands, or Reservation waters, not otherwise exempted by this Ordinance or implementing regulations, which has the potential to cause a material change in the condition of such lands or water in contravention of the policy of this Ordinance, and includes but is not limited to dredging, filling, unregulated access detrimental to aquatic lands, irrigation diversions and returns, drainage ditches and construction on aquatic lands, and furthermore, includes maintenance or repair involving any of the above activities.

m. "Reservation waters" means:

(1) all naturally occurring bodies of water within the exterior boundaries of the Reservation regardless of alteration by man, including but not limited to lakes, rivers, streams (including intermittent streams), mudflats, wetlands, sloughs, potholes and ponds from which fish and wildlife are or could be taken, but does not include wholely [sic] manmade water bodies.

(2) tributaries of waters identified in subpart (1) above;

(3) wetlands adjacent to Reservation waters.

n. "Responsible person" means any person who undertakes a project or causes a project to be undertaken on aquatic lands.

o. "Tribal Council" means the duly elected governing body of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

p. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include but are not limited to swamps, marshes, bogs and similar areas.

Section 2. Administration.

The Shoreline Protection Board of the Tribes, as created by Ordinance 64A (Revised), shall have the powers and duties associated with implementation of this Ordinance and any regulations promulgated hereunder. The rights, responsibilities and immunities of the Board, and the Tribal Council, as specified in Ordinance 64A (Revised) remain unchanged.

Section 3. Water Rights.

This Ordinance shall not be construed to diminish or divest any existing water uses established in accord with applicable law.

Section 4. Regulations.

The Tribal Council may promulgate regulations to implement the provisions of this Ordinance upon recommendation of the Board. Regulations shall be promulgated pursuant to procedures contained in the Tribal Administrative Procedures Ordinance.

PART IV

PERMITS

Section 1. Permit Required.

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

Section 2. Permit Fees.

An application for a permit shall be accompanied by payment of a non-refundable fee to cover some costs associated with permit issuance and administration. The amount of the fee shall be fixed from time to time by regulation, shall take into account the scope of the proposal, and shall be reasonable.

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

b. The application shall be on a form provided by the Office and shall include, but is not limited to, a

location map, a specific description of the proposed project, the purpose and need for the project, practical alternative methods of implementing the project, and a plan specifying the type, quantity and source of materials to be used, means of access to the project area, the length of time necessary to complete the project, and the name, address and telephone number of the responsible person.

Section 4. Evaluation of Proposed Projects.

a. The Administrator of the Office shall review an application for a permit for adequacy and for project technical feasibility, shall determine if the proposal constitutes a project, and may make such on-site investigations as are necessary to perform these duties.

b. If the Administrator determines that the proposal is not a project the Administrator shall so state in a written notice to the person responsible for the project within 14 days of receipt of the application.

c. If the Administrator determines that the proposal is for a project, the Administrator shall bring the application before the Board at the next regularly scheduled Board meeting or may call a special Board meeting if circumstances so require.

d. The Board shall review all applications. The Board shall either approve, approve with modifications or alternatives, or disapprove an application and shall state its decision in writing to the responsible person.

e. Upon approval or upon approval with modification or alternatives, the Administrator shall forward to the responsible person a permit which shall relate to the

plan for the project approved by the Board, and which may include provisions for mitigation of adverse impacts associated with the project.

Section 5. Emergencies.

a. The provisions of this Section do not apply to emergency actions which are necessary to safeguard life or property during periods of immediate and substantial endangerment to life or property. The responsible person under this Section shall notify the Office in writing of the emergency undertaking within fifteen (15) days of commencement of such undertaking.

b. The Administrator shall make an on-site inspection of an action and cause a written report of such observations to be filed in with the Office and a copy shall be sent to the responsible person. The report shall include:

(1) a finding as to whether or not an emergency situation existed at the time the action was taken;

(2) a finding as to whether or not the action constitutes a project; and

(3) if the findings required in subparagraphs (1) and (2) above are affirmative, and a permanent solution is feasible, recommend in writing that the responsible person put the solution into effect within a specified reasonable amount of time pursuant to a duly issued permit. Failure of the responsible person to put the solution into effect is not a violation of this Section unless a substantially similar action arises from such failure to act.

Section 6. Modification or Revocation of Permit.

The Board may, upon a finding of non-compliance or upon a finding of necessity, either modify or revoke a permit after the responsible person has been afforded notice and an opportunity to be heard.

PART VI

ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized agent may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars for each day that the responsible person continues to engage in or maintains a non-conforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

PART VI [sic]

REVIEW, SEVERABILITY, EFFECTIVE DATE

Section 1. Administrative Appeal of Board Action.

A person aggrieved by a final action of the Administrator or the Board may seek review of such action pursuant to procedures contained in the Tribal Administratives [sic] Procedures Ordinance, Ordinance 86A. For purposes of administrative review, a decision of the Board shall constitute final agency action, appealable to an administrative law judge.

Section 2. Judicial Review.

a. The Tribal Court of the Confederated Salish and Kootenai Tribe shall have jurisdiction to hear and decide all causes arising under this Ordinance and implementing regulations and to hear appeals from agency actions upon exhaustion of administrative remedies.

b. The decision of the Tribal Court shall be final.

Section 3. Severability.

If any provision of this Ordinance or the applicability thereof is held invalid by any court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

Section 4. Effective Date.

This Ordinance shall become effective, pursuant to the terms of Article VI, Section 2 of the Tribes' Constitution, upon promulgation of implementing regulations by the Tribes.

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985. with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (l), (n), (t) and (u) of the Tribes Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James J. Steele
Vice-Chairman, Tribal Council

ATTEST:

/s/ Joseph E. Dupuis
Executive Secretary

APPROVAL:

_____

Title: _____
Bureau of Indian Affairs

Date: _____

APPROVED:
Donovan R. Boldt
SUPERINTENDENT

Received Office
of Superintendant

FINAL REGULATIONS FOR THE AQUATIC LANDS CONSERVATION ORDINANCE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

(December 5, 1986)

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PART V
ENFORCEMENT

Section 5.1 Violations.

The following actions shall constitute an act of non-compliance with these regulations and Ordinance 87A:

(1) commencement or initiation of a project without the responsible person first obtaining a permit; or

(2) continuation of work on an unpermitted project by any person; or

(3) failure to comply with the terms or conditions of a permit; or

(4) failure to comply with the terms and conditions of Ordinance 87A and these regulations; or

(5) failure to comply with orders of the Board.

Section 5.2 Notice of Non-compliance.

(a) When the Administrator has reason to believe that a violation of Ordinance 87A, these regulations, or any permit or order issued pursuant thereto has occurred, he shall issue a Notice of Non-Compliance. A Notice of Non-Compliance shall serve as a summons and compliant [sic] for purposes of the violation.

(b) A Notice of Non-Compliance shall advise the person to whom issued of the following information:

(1) there may exist an opportunity to cure alleged acts of non-compliance, and if so, the method and time for cure;

(2) that an Answer to the Notice must be made in writing and received by the Office within fifteen days of receipt of a Notice;

(3) the consequences of failing to Answer;

(4) the nature of each alleged violation;

(5) the type and amount of any fine or penalty that may be assessed for each alleged violation; and

(6) the date and place at which a hearing on each alleged violation will be held, if not cured, which shall not be less than thirty (30) days no more than sixty (60) days after the date of issuance of a Notice.

(c) A Notice of Non-Compliance shall be served either personally or by registered or certified mail.

Section 5.3 Answer.

(a) A person to whom a Notice of Non-Compliance has been issued shall answer within fifteen (15) days of the date of receipt of the Notice of Non-Compliance. Answer shall be made by mail and may be accompanied by a personal appearance before the Board or its designated agent.

(b) An Answer shall either admit or deny the violation, raise all affirmative defenses, and state whether or not the person in non-compliance will undertake curative measures, if any, specified in the Notice of Non-Compliance.

(c) If an Answer states that a person will undertake curative measures that may be specified in the Notice, the hearing scheduled in the Notice may be held in abeyance for a reasonable amount of time to enable the curative measures to be completed. If curative measures are completed in a reasonable amount of time and to the satisfaction of the Administrator the hearing may be cancelled at the discretion of the Administrator. Satisfactory completion of curative measures does not obviate imposition of other fines or penalties if a reasonable basis exists for their imposition.

Section 5.4 Contested Cases.

(a) A hearing for the resolution of a contested case shall be held pursuant to the procedures contained in Ordinance 86A of the Confederated Salish and Kootenai Tribes, the Tribal Administrative Procedures Ordinance

(hereafter called "TAPO"). As applied to this Ordinance the "chief executive officer" referenced in PART VI Section 23 of TAPO shall be the Board.

(b) The provisions of TAPO shall provide the procedures for administrative and judicial review of all contested cases arising under this Ordinance.

(c) If a contested case involves a significant public interest the Board may, on its own motion, solicit public comment. The Board may condition or limit public comment as is necessary for prudent administration of these regulations. In the event that the Board determines public input is necessary it may toll any time frames contained in these regulations for the duration of the public comment period.

Section 5.5 Penalties.

Upon a finding that the person served with a Notice of Non-Compliance has committed a violation of Ordinance 87A, these regulations, a condition of a permit, or an order of the Board, any or all of the following penalties may be assessed and ordered:

(1) revocation of an applicable permit;

(2) removal of the project and restoration of the underlying property;

(3) imposition of a monetary fine;

(4) prescription of remedial measures.

Section 5.6 Actions to Enforce.

The Administrator may institute in Tribal Court, under the procedures there applicable, a civil action to collect against any person who has been ordered to pay a penalty or perform remedial measures pursuant to these regulations and who has not appealed such decision or who has not paid an assessed fee, cost, or penalty.

Section 5.7 Revocation of Permit and Restoration of Permit Area.

(a) In addition to revocation of a permit the responsible person may be ordered to remove a project and to restore the area surrounding and underlying the project.

(b) Removal of a project and restoration of the surrounding area must be accomplished within sixty (60) days of of [sic] an order directing such action, except that the Board or Court may, on its own initiative, or upon application of the responsible person, delay the removal and restoration for up to twelve months if it is determined that such delay would reduce the likelihood of environmental damage resulting from such removal and restoration.

Section 5.8 Failure to Comply With an Order to Remove.

(a) In the event that a person responsible for a project fails to comply with an order directing removal and restoration, the Board, after the lapse of a sixty-day grace period, may undertake the removal of the project and restoration of the underlying property on its own

initiative, and may assess the responsible person for the costs of such work.

(b) The Administrator must notify the responsible person by mail at least five (5) days in advance of the planned enforcement action that it plans to remove the project and perform any necessary restoration.

Section 5.9 Fines.

(a) Any person responsible for a project constructed or maintained contrary to the provisions of Ordinance 87A, these regulations, or the terms of a permit shall be subject to a penalty of not less than twenty-five dollars ($25) or more than five hundred dollars ($500) for each act of non-compliance.

(b) Each day during which an act of non-compliance shall continue shall be considered a separate violation of these regulations and of Ordinance 87A.

(c) Nothing in these regulations will be interpreted to deny the use of other civil remedies available under Tribal or federal law.